No. 14,745

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN ROGERS MACKENZIE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Oregon.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal (R 28) from a judgment of conviction (R 26) for violation of 2 U.S.C.A. 192 by reason of appellant's failure to answer certain questions propounded to him at a hearing of the Subcommittee of the House Committee on Un-American Activities. Appellant was sentenced to ten months imprisonment on each of four counts, the sentences to run concurrently and to pay a fine of $250 on the first count (R 27).

This appeal presents many questions of law and of fact identical with the questions presented in *Wollam v. United States* now pending in this Court,

No. 14,744. Wollam's brief is being filed contemporaneously with this one. In order to avoid unnecessary duplication, and pursuant to a stipulation filed herein on October 10, 1956, appellant will materially shorten this brief by incorporating herein many of the statements, points and arguments made in the Wollam brief. Where there are any significant differences between Wollam's case and appellant's case, this brief will consider them.

JURISDICTIONAL STATEMENT AND STATUTES INVOLVED.

Jurisdiction in this case is conferred by the same statutes as are involved in Wollam's case and the portions of his brief (pp. 1-2) dealing with such matter is hereby incorporated herein.

STATEMENT OF THE CASE.

MacKenzie was called to testify before the Subcommittee in Portland on June 18, 1954. The same "setting" which existed when Wollam testified and which is discussed in detail in Wollam's brief (pp. 2-5), also prevailed when this appellant was called to testify. In addition, it must be noted here that MacKenzie himself had been specifically identified as a member of the Communist Party (Hearings, p. 6614).[1]

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[1]Reference is made to the appendix to the Wollam brief for further details of the testimony and for a complete picture of the "setting".

The questions which this appellant refused to answer had to do with his residence, his employment, his college education, and his age.[2] The House certified appellant's refusal to answer these questions to the United States Attorney for prosecution (R 49, Ex. 4), and appellant was thereupon indicted for violation of 2 U.S.C.A. 192. The indictment was substantially in the same form as the indictment in the Wollam case. Pre-trial motions, identical with those filed by Wollam, were here made and denied (R 5-6, 9-10, 20). The case was thereafter brought to trial, and after the Government had concluded its evidence, a motion for a judgment of acquittal was made pursuant to Rule 29, F. R. Crim. Proc. and was denied (R 68-70). Appellant was subsequently found guilty on all counts. A motion for a new trial on the same grounds as urged by Wollam was made and denied (R 25-26). Thereafter, appellant was sentenced to imprisonment and to pay a fine (R 26-27), and this appeal followed (R 28).

SPECIFICATION OF ERRORS.

Appellant hereby adopts the Specification of Errors numbered 1 to 5, inclusive, set forth in the brief in the Wollam case (pp. 9-10), and by this reference incorporates the said Specification of Errors herein as though fully set forth at this point.

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[2]Count I: "Mr. MacKenzie, what is your present residence?"
Count II: "Mr. MacKenzie, where are you employed?"
Count III: "Did you ever attend Reed College?"
Count IV. "What is your present age, sir?" (R 4).

SUMMARY OF ARGUMENT.

Appellant hereby adopts the summary of argument under Points I to III, inclusive, set forth in the brief in the Wollam case (pp. 10-11), and by this reference incorporates said points herein as though fully set forth at this point.

ARGUMENT.

I.

THE INDICTMENT DID NOT PROPERLY CHARGE EITHER PERTINENCY OR WILFULNESS AND THE EVIDENCE FAILED TO ESTABLISH EITHER OF THESE ELEMENTS.

The argument made by Wollam under Points I and II of his brief (pp. 12-20) is equally applicable here. Appellant adopts it in its entirety by this reference.

1. The questions involved in the first three counts of the indictment here, seeking, as they did, to elicit information as to appellant's residence, employment and attendance at Reed College, are indistinguishable in law and in fact from the questions discussed in Wollam's brief. For the reasons there assigned, it must be held that these questions were not pertinent to the inquiry.

2. The fourth question asked of this appellant sought to elicit his present age. This is the only question of its kind asked of appellant and not of Wollam. As to it, however, it is also clear that it was not pertinent. What John MacKenzie's age was—thirteen or thirty—could hardly be relevant to any valid Congressional purpose. It is impossible to see how

Congress could have more intelligently drafted legislation if it knew how old this appellant was. Like the other questions put, this question was an incursion into appellant's "private affairs" and was "unrelated to a valid legislative purpose" (*Quinn v. United States,* 349 U.S. 155, 161) and can no more be made the basis of a judgment of conviction than can any of the other questions.

3. As to all four of the questions, the record fails to show the wilfulness and deliberateness required to constitute the offense. The record here, as in Wollam's case, shows affirmatively that appellant was asserting in good faith what he believed to be valid objections to the questions put. Like Wollam, appellant here relied upon advice of counsel, and did not manifest that contemptuous attitude which is an element of the offense. We show below that the objections pressed by appellant were well taken, but in any case it cannot be said that they were urged in bad faith. Here, as in the Wollam case, the essential element of wilfulness is lacking.

II.

APPELLANT WAS CLEARLY ENTITLED TO INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The "setting" in which appellant was asked the four questions here involved was identical with that which faced Wollam when he was called to testify. Appellant, like Wollam, knew that the Committee was seeking to ferret out subversion and that it was

endeavoring to link him with the Communist Party; indeed, one witness had already identified him as a member of the Communist Party (Hearings, p. 6614).

His apprehension of prosecution for any of the various crimes already specified in the Wollam brief (p. 22) was certainly not unreasonable and he was entitled to exercise the privilege against self-incrimination.

1. It has long since been determined in this Circuit that in a setting such as we have here, a witness is not required to answer questions dealing with residence[3] and employment (*Starkovich v. United States,* 231 F. 2d 411 (CA 9); *Jackins v. United States,* 231 F. 2d 405 (CA 9); *Alexander v. United States,* 181 F. 2d 480 (CA 9), and related cases cited in the Wollam brief [p. 21]). The cases from the Supreme Court and the other Circuits are also collected in the Wollam brief under Point III (pp. 20-29).

2. For the reasons specified in the Wollam brief under Point III B 3 (pp. 25-26), it is equally clear that the question as to whether appellant ever attended Reed College was one which, considering the testimony that had been given that there was a Communist Party club at the college, he had the right to refuse to answer.[4] His answer might well have been

[3]Indeed Committee counsel specifically asked appellant if it weren't "a fact . . . that Communist Party meetings were held in your home?" (Hearings, p. 6654).

[4]We are not presented in MacKenzie's case with the questions of elementary and high school education which are discussed in the Wollam brief. In MacKenzie's case the question went immediately,

the first bit of foundational evidence upon which the government could have connected him with such activity.

3. The other question asked of MacKenzie, having to do with his "present age", might well also have been incriminating. In connection with this, it will be remembered that witnesses had already testified that in the Communist "underground", persons adopted new and different identities, and changed not only their names, social security numbers, residences, but also their *ages* (Hearings, p. 6643). A question which would require a witness to state his age might very well lead to an identification of the witness as a person who, at a certain time, was or had been associated with Communist or subversive activities.[5] Committee counsel himself admitted that the question was a "definite identifying question" (R 47).

Under all the circumstances, the decisions in *Hoffman v. United States,* 341 U.S. 479, and *Trock v. United States,* 351 U.S. 976, as well as the other cases cited in Wollam's brief, make it clear that appellant's invocation of the privilege against self-incrim-

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not merely to education on a college level, but specifically to attendance at Reed College which, as has been indicated, was the alleged scene of Communist and subversive activities.

[5]In connection with another witness before the Committee, and one whose appeal is also pending in this Court (*Simpson v. United States,* No. 14,743), one of the "friendly" witnesses was asked to make identification by stating the witness' age (Hearings, p. 6619); as to another person (Spencer Gill) the identification was also made in the same manner (Hearings, p. 6622).

ination was justified and that he is entitled to a reversal with instructions to enter a judgment of acquittal.

Dated, San Francisco, California,
October 15, 1956.

Respectfully submitted,
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